

R. Wade Curtis  
BELNAP & CURTIS, PLLC  
1401 Shoreline Drive, Suite 2  
Post Office Box 7685  
Boise, Idaho 83707

Telephone: (208) 345-3333  
Facsimile: (208) 345-4461

Attorney for Defendant

01/27/08 11:20:04  
CLERK  
CAMEL  
IDAHO

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

RECUPEROS, LLC, an Idaho limited  
liability company,

Plaintiff,

vs.

AMERICAN FOOD STORES, LLC, a  
California limited liability company,

Defendant.

Civil No. 04-229-S-BLW

OBJECTION TO PLAINTIFF'S  
MOTION FOR PRELIMINARY  
INJUNCTION AND EXPUNGEMENT  
OF LIS PENDENS

COMES NOW the Defendant, American Food Stores, LLC (hereinafter "AFS"), by and through its attorney R. Wade Curtis, of the firm of Belnap & Curtis, PLLC, without waiving any defenses, pursuant to Rule 6(b) and 12(a)(2) of the Federal Rules of Civil Procedure, and pursuant to Rule 65(b) of the Federal Rules of Civil Procedure and objects to this Court granting the Plaintiff's Motion for Preliminary Injunction and Expungement of Lis

OBJECTION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION ND  
EXPUNGEMENT OF LIS PENDENS -- Page 1

ORIGINAL

Pendens on the grounds and for the reasons set forth hereinafter. AFS requests that this Court not issue a preliminary injunction against AFS and allow the four recorded lis pendens to remain a matter of public record in Colorado.

## **I. STANDARD OF REVIEW**

A decision whether to grant a motion for a preliminary injunction is reviewed for abuse of discretion. Walczak v. EPL Prolong, Inc., 198 F.3d 725, 730 (9th Cir. 1999). Abuse of discretion occurs if the court bases its decision either on "an erroneous legal standard or clearly erroneous factual findings." *Id.* (citation omitted). A court can apply an erroneous legal standard if: "(1) the court did not employ the appropriate legal standards that govern the issuance of a preliminary injunction; or (2) in applying the appropriate standards, the court misapprehended the law with respect to the underlying issues in the litigation." *Id.* (citing Sports Form, Inc. v. United Press Int'l, Inc., 686 F.2d 750, 752 (9th Cir. 1982)). If a court relies on an erroneous legal standard, the appellate court will review the underlying legal issues de novo. Does 1-5 v. Chandler, 83 F.3d 1150, 1152 (9th Cir. 2002).

## **II. DISCUSSION**

**A. Whether or not the four recorded Lis Pendens are lawfully recorded is a matter solely to be dealt with by the Plaintiff's title company in Colorado and is the matter for the Colorado Court's to decide. Under 28 USC Section 1367 this Court does not have supplemental jurisdiction.**

The AFS concedes that as to the Asset Purchase Agreement entered into between the parties, Idaho law governs and the US District Court in Idaho is a proper forum. Insofar as

AFS contests the validity of the Settlement Agreement, AFS denies that Idaho is the covering law and that Idaho is the proper jurisdiction for resolution. However, the parties' agreement as to forum and choice of law does not apply to the issue of the validity of the four lis pendens recorded in Colorado relating to real property located in Colorado. In that regard, the laws of the state of Colorado are controlling and a court in the State of Colorado is the proper forum. Therefore, AFS objects to the Court's having subject matter jurisdiction to resolve this matter or exercising supplemental jurisdiction under Title 28 USC Section 1367.

First, at this point in the proceeding, the only cause of action before the Court is an action to declare the validity and enforceability of a certain contract, i.e., the Settlement Agreement, as contained in the Plaintiff's Verified Complaint.

Second, that contract (i.e., the Settlement Agreement) does not involve any real property, in that, as the Plaintiff correctly alleges, this lawsuit merely involves a dispute over a sum certain, i.e., \$306,155.15.

Third, in bringing this Motion under the Plaintiff's case for declaratory relief, the Plaintiff is attempting to create an independent cause of action that is not within the Court's supplemental jurisdiction and without filing a proper complaint as required by Rule 3 of the Federal Rules of Civil Procedure. Rather, the Plaintiff relies on a Memorandum and Affidavits, as opposed to a verified Complaint.

Notwithstanding the recorded lis pendens deal with real property that was the subject of the parties' Asset Purchase Agreement, the lis pendens do not relate to the Plaintiff's cause of action for declaratory judgment (i.e., the Complaint in this case deals solely with whether the Plaintiff's can rightfully retain the \$306,155.15 deposit according to the Settlement Agreement). Defendant recognizes that the lack of relationship between the Plaintiff's cause of action against Defendant may be the very basis for relief from a Colorado court. However, the Federal District Court sitting in Idaho does not have supplemental subject matter jurisdiction over the validity of lis pendens filed in Colorado.

The fact that Manjit Sahota choose to put this case heading on the lis pendens does not give the Court supplemental jurisdiction.

Therefore, this Court ought to deny the Plaintiff's request for preliminary injunction and expungement of the lis pendens.

**B. Without waiving the argument that the Court does not have subject matter jurisdiction, a preliminary injunction cannot issue in this case because the Plaintiff has not established that irreparable harm will result if the four (4) recorded lis pendens are allowed to remain a matter of public record.**

"The standard for granting a preliminary injunction balances the plaintiff's likelihood of success against the relative hardship to the parties." Clear Channel Outdoor Inc. v. City of Los Angeles, 340 F.3d 810 (9th Cir. 2003). "The Ninth Circuit has described two sets of criteria for preliminary injunctive relief. Under the "traditional" criteria, a plaintiff must show

(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases). Alternatively, a court may grant the injunction if the plaintiff demonstrates either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor. These two alternatives represent extremes of a single continuum, rather than two separate tests. Thus, the greater the relative hardship to the party seeking the preliminary injunction, the less probability of success must be shown.” Earth Island Institute v. U.S. Forest Service, No. 02-16999 (Dec. 11, 2003) (9th Cir. 2003) (internal quotations and citations omitted).

In his affidavit in support of the Motion for Preliminary Injunction<sup>1</sup>, Mr. Brain Naeve only states that both the title company and the [alleged unidentified] buyer of the subject property has reassessed their existing commitments [whatever those undisclosed commitments may be] and to seek additional, [unitemized and undisclosed allegedly] expensive and time-consuming assurances from the plaintiff. In making that statement, Mr. Naeve merely

---

<sup>1</sup> Defendant has filed a Motion to Strike the contents of Mr. Naeve's Affidavit in Paragraph 9. The argument herein as to the lack of admissibility of Mr. Naeve's Affidavit are in addition to those raised in the Motion to Strike. Even if Paragraph 9 is not stricken, the contents of his Affidavit do not establish (by any legal standard) that there is or will be irreparable harm suffered by the Plaintiff. The Plaintiff is merely inconvenienced. However, if the Plaintiff had not breached its agreement with AFS, the Plaintiff would have a completed sale. The four recorded lis pendens merely secure AFS's claim of damage against the Plaintiff. By definition, money damages are not irreparable harm.

states that the alleged buyer is reassessing their existing commitments and reassessing the need for additional assurances. In other words, Mr. Naeve has failed to plead actual or possible harm.

Further, Mr. Naeve adds to the confusion as to what the buyers and the title company are presently doing, when he relates that the new buyer has expressed grave concerns regarding the quality of title to the subject properties and is extracting and attempting to extract additional financial and contractual concessions from the Plaintiff. Obviously, contrary to Mr. Naeve's statement, the new buyer has either been successful in extracting additional financial and contractual concessions or the new buyer is merely seeking, but has not yet been denied, additional financial and contractual concessions. It is one or the other, not both. This sort of theorizing is inimical to the burden that the Plaintiff show real damage.

The Plaintiff has the burden of establishing probable success on the merits and the possibility of irreparable harm. The subject matter of this lawsuit is the contractual rights of the parties. It involves a sum certain of \$306,155.15 dollars. Money has never been considered by the 9th Circuit Court of Appeals as amounting to irreparable harm. Money can always be replaced.

The fact that the Plaintiff may not realize as much money on the transaction or may have to give concessions of either a financial or a contractual nature is not irreparable harm.

The Plaintiff has the burden of showing that the possible injury is "irreparable." The Plaintiff's submissions to this Court fail to show its alleged potential harm is irreparable. Rather, it appears that the alleged harm -- if true -- is completely repairable (i.e., by money damages).

Irreparable injury will not result to the Plaintiff if the four (4) lis pendens are allowed to remain a matter of public record. The contract between the Plaintiff and AFS, which AFS asserts the Plaintiff breached, was for the purchase of approximately 19 convenience stores located in Colorado, of which only 12 were owned outright by the Plaintiff. The other seven (7) stores are located on leased premises. The deal between Plaintiff and Defendant amounted to approximately \$9.7 million dollars. Therefore, the lis pendens encumbers only four (4) of the nineteen (19) stores encumbers less than \$2.02 million dollars of the deal (ignoring the relative value of the owned vs. leased properties).

At the existence of the lis pendens involves a reservation of rights under the title policy and amounts to a specific sum of money, that is easily calculable and is not irreparable.

**C. Rather that the Plaintiff being able to show a strong likelihood of success, rather, there is a strong likelihood that AFS will succeed on the merits based on the following legal theories:<sup>2</sup>**

---

<sup>2</sup> This Memorandum is due to be filed with the Court at 12:00 noon, on Wednesday, June 24, 2004. The two members of AFS live in California and Colorado. Defendant's counsel has spoken by telephone with the two members of AFS and base its proposed legal theories on that telephone conversation. Counsel for Defendant is preparing and will file with the Court Affidavits to support the factual statements made herein, however, the two affidavits will not be filed until late Wednesday or early Thursday morning. In addition, the two members are sending to counsel copies of emails, faxes, transmittal and telephone records to verify and

(1) That the Plaintiff breached the parties, Asset Purchase Agreement when the Plaintiff refused to continue with the sale after having granted AFS additional time to do its due diligence. With regard to this issue, AFS is an LLC consisting of two members, Manjit Sahota and Sukhdev Kapur. During the time period during which the two members were doing their due diligence, Manjit's parents were killed in a car accident in Canada and at approximately the same time, Sukhdev had to go to India, his home land, for an emergency. At that time, Mr. Naeve granted the two members of the LLC additional time to do their due diligence. As such, the \$1.0 million dollar earnest money payment was not due and payable at the time that the Plaintiff claimed and used as the basis for terminating the Asset Purchase Agreement. The Plaintiff violated the parties' implied covenant of good faith and fair dealing and violated the express oral agreement that existed between the parties.

(2) Related to the first basis for AFS's ultimate success on the merits, is the fact that the Plaintiff, through its representatives required AFS to make the \$1.0 million dollar earnest money payment directly to the Plaintiff and not to an independent third party escrow holder.

---

establish the facts set forth herein. That proof has not yet been received.

It should be noted that Defendant's counsel received notice of Plaintiff's Motion during the morning of Saturday, June 19, 2004, the Plaintiff having delivered the Motion, Memorandum and Affidavits to counsel's home at 11:55 p.m., on Friday night, June 18. Counsel's wife answered the door. Defendant's counsel received notice of the hearing on the motion on Monday, June 21, 2004.

This requirement by the Plaintiff was in breach of the parties' Asset Purchase Agreement and a breach of the implied covenant of good faith and fair dealing.

(3) With regard to the Settlement Agreement, Mr. Naeve and the Plaintiff and the Title Company all had actual knowledge that under the LLC's Operating Agreement, neither member could individually or unilaterally make any decision or take any action binding on the LLC. All acts and decisions of the LLC had to be jointly made by the two members acting in concert. The Plaintiff expressly ignored that fact when it proposed the Settlement Agreement and mislead Manjit into signing the Settlement Agreement under the assumption that the Settlement Agreement was being submitted to Sukhdev for signature. In addition, only the signature pages of the Settlement Agreement was submitted to Manjit. Manjit did not read the Settlement Agreement closely and he was unaware that he was being required to hold the Plaintiff harmless as against any claim by Sukhdev. Additionally, insofar as the Plaintiff may prevail that Manjit is absolutely responsible for what he signed, there is no consideration for the Settlement Agreement.

(4) The Defendant reserved the right to set forth and allege additional basis for why the Court ought to deny the Plaintiff's request for declaratory judgment and why the Court ought to grant AFS's affirmative relief against the Plaintiff on Defendant's causes of action.

Even assuming the Plaintiff has shown it may suffer irreparable harm, that harm is minuscule and therefore, the Plaintiff's burden of showing likelihood of success is significantly

heightened. The Plaintiff cannot meet its burden in this case. Little or no harm will result to the Plaintiff as the underlying real property is unlikely to lose any value in the time it takes this Court to finally adjudicate the legal issues involved herein. As such, the Plaintiff's burden of showing a likelihood of success becomes less. Earth Island, *supra* ("[T]he greater the relative hardship to the party seeking the preliminary injunction, the less probability of success must be shown.").

**D. The Plaintiff is required to post a bond or otherwise provide security for the injunction.**

Rule 65(c) ("Security"), Federal Rules Civil Procedure provides:

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof. The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

*Id.* The Plaintiff has not posted a bond, but if the Plaintiff is deemed to have established irreparable harm, then a bond in the amount to compensate AFS for its loss and attorney fees would be at least \$1.5 million dollars. At the very least, the amount of money which is the subject of the Plaintiff's case, \$306,155.15 plus one-third that amount should be posted.

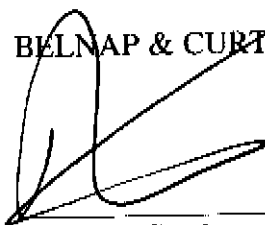
### III. CONCLUSION

First, this Court lacks subject matter jurisdiction to consider the Plaintiff's Motion for preliminary injunction as the case and motion are presently postured.

However, if the Court were to find that it does have subject matter jurisdiction, for the additional reasons set forth herein, primarily that the Plaintiff has failed to establish irreparable harm and has failed to establish that it will likely prevail in this matter, AFS requests this Court deny the Plaintiff's request for issuance of a preliminary injunction against AFS above-named, their agents, or any other party acting in concert therewith, and allow the four lis pendens to remain a matter of public record to be dealt with as the Plaintiff, its new buyer and title company may so devise to do until such time as this Court can finally determine the underlying issues related to this case.

DATED this <sup>12</sup>23 day of June, 2004.

BELNAP & CURTIS, PLLC



R. Wade Curtis  
Attorney for Defendant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 23 day of June, 2004, I caused to be served a true and correct copy of the above and foregoing document by the method indicated below, and addressed to the following:

☐ MAILED

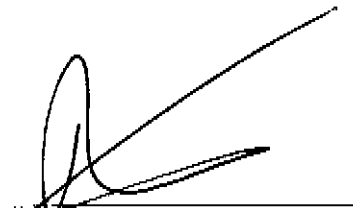
☒ FAXED -- 385-5384

☐ HAND DELIVERED

☐ OVERNIGHT DELIVERY

Attorney(s) and/or Individual(s) Served:

Michael O. Roe  
Post Office Box 829  
Boise, Idaho 83701

  
K. Wade Curtis